

Policy Statement
for
CALCULATING DELAYS AND DAMAGES
in the
City of Mesa, Arizona

The purpose of this policy statement is to establish guidelines and procedures for negotiation between the Contractor and City of Mesa relating to compensation for delays pursuant to A.R.S. 34-221(D). This policy statement contains notice requirements in addition to those set forth in the contract documents, and shall be the contract provision contemplated by that statute.

NOTE: As used herein, the term "Engineer" shall refer to the City of Mesa Engineer or his designated representative. Nothing in this Policy Statement shall be construed to void any provision in the Contract which requires timely notice of delays or provides for arbitration or any other procedure for settlement or provides for liquidated damages.

I. TYPES OF DELAYS:

There are essentially four types of delays encountered in construction contracts; excusable/compensable, excusable/noncompensable, nonexcusable and concurrent. Only delays that extend "contract completion time" set forth in the contract document will be considered for issues relating to contract extensions or additional compensation. All other delays are considered to be activity delays and do not entitle the Contractor to either time extensions or additional compensation. "Contract completion time" shall be defined as the date set forth in MAG Standard Specification Section 101 and as may be modified by the Contract Documents.

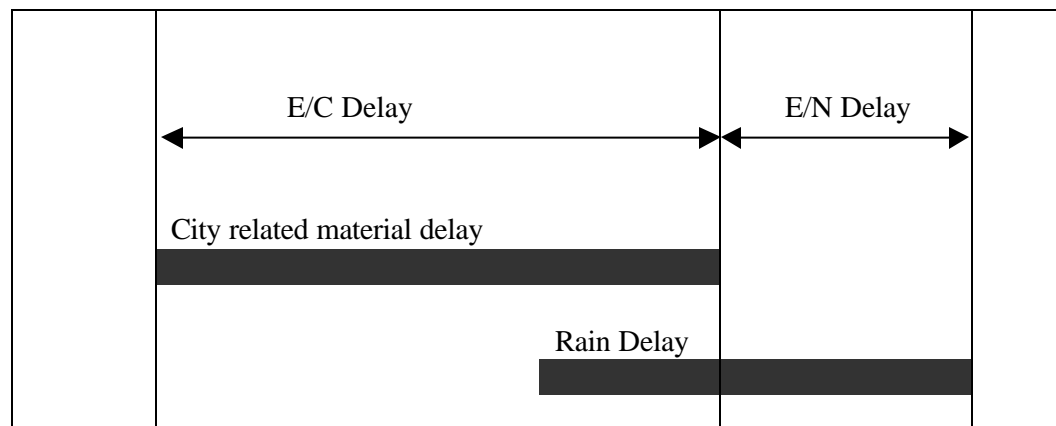
- A. Excusable/Compensable - These are delays caused solely by the City's actions or inactions, are unreasonable under the circumstances, and which were not within the contemplation of the parties to the Contract at or prior to the time of execution of the Contract. Since the Contractor presumably has no control over the events causing the delay, he may be entitled to both contract time extensions and additional compensation for delay damages. Further, he may be entitled to additional compensation from the impact of that delay on other work. Examples of excusable/compensable (E/C) delays include: Failure to properly locate/Blue Stake an underground City-owned utility within 2 feet of the actual location; failure to relocate City-owned utilities far enough in advance of construction in an area where the Contractor is scheduled to work that it delays start or completion of the Contractor's regularly scheduled work; failure to provide City-furnished equipment or materials in a timely manner if required by the Contract; failure to acquire necessary Right-of-Way or Public Utility Easements prior to the Contractor beginning work in the area; failure to timely return shop drawings or other contract submittals in accordance with the contract; unreasonable delay by the City in making decisions which affect critical activities; surveying errors when the City is contractually responsible for providing project surveying. This list is not meant to be all inclusive but is intended merely as examples of the type of City action or inaction which can result in a Contractor's claim for additional time and compensation.

- B. Excusable/Noncompensable - These are delays over which neither the City nor the contractor had control. Since both parties to the Contract have been potentially damaged by the delay but neither have caused it, only time extensions are warranted. Examples of excusable, noncompensable (E/N) delays include; unusually severe weather; fire; acts of God; failure of non-City owned utilities (SRP, US West, cable TV, SPRR, El Paso and Southwest Gas, etc.) to properly or timely locate/Blue Stake accurately; failure of non-City owned utilities to relocate in advance of construction; the voluntary or involuntary filing for Bankruptcy protection by a supplier or subcontractor which causes the supplier/subcontractor to fail to meet a contractual deadline provided the Contractor can provide documentation that he executed the required purchase orders/subcontract agreements and received delivery schedules which, if met, would have eliminated the delay; delays as a result of an incomplete shutdown of a City or non-City owned utility main (the City does not guarantee a complete shutdown). This list also is not necessarily all inclusive but merely indicative of type and class of E/N delays.
- C. Nonexcusable - These are delays caused by the actions or inactions of the Contractor or an officer, employee, agent, subcontractor, supplier or any other party for whom the Contractor is responsible. Since the Contractor had assumed responsibility for the risks associated with the events that caused the delay, he is not entitled to either time extensions or monetary delay damages. All nonexcusable delays are also noncompensable. Examples of nonexcusable, noncompensable (N/N) delays include: failure to perform by the Contractor, its subcontractors and/or suppliers (except as noted in para A.2 above); failure to provide adequate labor, materials, and/or equipment on the project; failure to perform contractually-required coordination with utilities, agencies and other Contractors; failure to notify the Engineer, in writing, of delay impacts within 48 hours, as required by MAG 104.2.3, or the next working day, as required by MAG 109.8.2; failure to timely submit shop drawings; failure to pothole or otherwise visually locate utilities sufficiently ahead of the work to allow the Engineer to direct corrective action when necessary; delays due to retesting of previously failed work, reinspection, and/or restaking resulting from faulty workmanship, poor quality control, and lack of compliance with contract specifications. Again this list is not necessarily all inclusive.
- D. Concurrent - When two or more delays occur simultaneously or overlap, each delay is analyzed separately to determine its impact on the overall project completion date based on when that delay started. Once again, only those delays which actually extend the contract completion time are considered as delays. The concurrent delay is considered an additional delay only to the extent it prolongs the delay to the contract completion time beyond the date that the one it is concurrent with had already delayed that date. For example, if two delays are concurrent, and one is five days long and the second is seven days long, the second concurrent delay will only extend the contract completion time by two days. The same method of analysis is used when there are multiple concurrent delays. Only those extending the project completion date are

considered to be delays for the purposes of this policy. The portion of each concurrent delay that delays the completion of the work is classified in the same manner as described previously for individual delays as being either E/C, E/N or N/N.

An example of a concurrent delay is where the City delays furnishing material but the Contractor could not have installed it anyway due to unusually severe weather. The effect of the first delaying activity will extend for the full duration and shall be considered controlling on the Contractor's schedule. A subsequent, concurrent delay shall thereafter only be considered to effect the project completion (if at all) once the first delaying activity has ceased to impact the project completion. In this case, if the unusually severe weather continued and delayed the work after the material was delivered, the first portion of the delay would be classified E/C (delay for material) and the second as E/N (delay due to unusually severe weather). Using the procedure set forth above, the entire concurrent portion would be considered E/C as shown in the chart which follows.

Example of a Concurrent Delay:



II. ANALYZING THE DELAY:

The contractor shall provide all documents required or requested by the Engineer to analyze the delay(s). It is important to understand that, prior to the delay analysis, delays and their impacts are alleged issues. The information the Contractor provides will be compared with the inspector's daily log and other available project information and together they will support or refute that delays occurred and, if so, how they impacted other work and the overall project completion. The Contractor's failure or delay in providing these documents shall be considered prima facie evidence that either the delay did not occur or it did not impact the project completion date and any claim for time extension or damages shall be denied.

The Engineer will accept delay analyses in CPM format, as these may demonstrate to his satisfaction whether or not project completion has been impacted by a specific event. If the Contractor chooses not to use CPM scheduling procedures, then the

burden will be on the Contractor to prove to the Engineer's satisfaction that the project completion has been impacted. The procedures below assume that the Contractor is using CPM scheduling methods. As a minimum the Contractor shall provide the following materials to the Engineer:

- A. **As-Planned Schedule.** The initial construction schedule, required by the contract documents, shall be considered the baseline schedule. It is to the Contractor's advantage that the as-planned (baseline) schedule be as detailed as possible in order for delays, as they occur, to be incorporated into the schedule in representative locations. It is also to the Contractor's advantage to use a computer software program to generate the schedule since updated schedules are required monthly by the contract documents and since updated schedules are required to support delays and requests for additional compensation for delays. The as-planned (baseline) schedule shall be presented in network format which clearly shows the interrelationships of the activities. The Contractor shall also provide a printout of the activities showing early start, early finish, late start, late finish, duration and float. The activity list printout shall also indicate predecessor and successor activities.
- B. **As-Built Schedules.** The as-planned (baseline) schedule shall be updated with complete progress-to-date information (actualized) up to the date of the start of the alleged delay. Each updated schedule will serve as the as-built schedule for analyzing the alleged delay and provide a new baseline as-planned schedule for the next delay. This process shall be repeated for each alleged delay as it occurs. In updating the baseline schedule, the alleged delay shall be treated as an activity and inserted into the schedule as a predecessor to the impacted activity (ies). When an activity that has already started is impacted, it is preferable to divide this activity into two parts and show the impact affecting the second part. For schedules which incorporate a time line (or data date), the delay activity shall be inserted at the time it actually occurred. Some software scheduling programs have a PAUSE-RESUME feature that can be used to facilitate these requirements. The updated schedule shall also be accompanied by a listing of activities as with the baseline schedule. This activities list shall contain the alleged delay as an activity showing the duration and the activities which are predecessors and successors to it. When computer generated schedules are used the Contractor shall provide 3.5" or 5.25" floppy disk(s) containing the complete data files for the updated schedule that included the delay activity preferably either in Primavera Project Planner format or in pure ASCII format readable on DOS-based PC's. Each computer disk shall contain a label identifying the Project name, Contractor's name, program name and version number, data date and project finish date.
- C. **Other Documents.** In order to determine the amount of the alleged delay and if it is compensable, the Contractor shall provide all backup documentation germane to the issue and as required by the Engineer. This documentation shall include copies of such items as: purchase orders; delivery schedules; correspondence; memoranda of telephone calls; force account daily worksheets (initialed by the Inspector); payroll data; estimating (bid) worksheets; and any

other materials which may be requested by the Engineer. (See Paragraph IV for documentation requirements).

- D. Procedure. Only after receipt of sufficient documentation will the Engineer analyze each alleged delay and determine if it is supported or refuted. If supported, the Engineer will determine if it is excusable or nonexcusable, compensable or noncompensable. If the Engineer determines that the delay did not affect the project completion the as-planned schedule, which has been updated to the date of the alleged delay, shall be revised to indicate this. If the Engineer determines the delay did occur but was N/N, then no time extension shall be granted. It is imperative that an actualized schedule be submitted as soon as the occurrence of the alleged delay is known. In no event shall the Contractor submit an actualized updated schedule later than 35 days after the occurrence of the alleged delay becomes known.

If the Engineer determines the delay did occur and was excusable but, due to a reason listed in para. I.A.2. is noncompensable, he will determine the length of the E/N delay and prepare a change order to add that time to the contract. The Engineer's decision shall be final.

If the Engineer determines the delay was excusable and compensable, he will determine the length of the E/C delay and proceed to review the Contractor's damage calculations in accordance with Section III. The Engineer will check the Contractor's calculations, review the backup documentation provided, and prepare a change order to cover both the additional compensation and the time extension. The Engineer's decision on both the time extension and additional compensation for the delay shall be final.

If the issue involves a concurrent delay, the Engineer will analyze available data to determine the portions which are E/C, E/N, and/or N/N as described above. The Engineer will proceed to determine the length of E/C delay and verify the Contractor's delay damage calculations if any are provided. Upon completion of his review, the Engineer will prepare a change order for the Contractor's review and signature. The Engineer's decision regarding excusable delay and additional compensation for the delay is final.

The amount of time the Engineer will require to analyze the alleged delay(s) will depend upon the Engineer's workload, the complexity of the delay analysis, availability of supporting data, extent of cooperation by the Contractor, and other factors beyond the Engineer's control. It is entirely possible other delay(s) may occur while the Engineer is analyzing particular claim for delay(s). The Engineer's failure to respond to the Contractor in a set period of time shall not be used as the basis for a further delay claim or as justification for extending and existing delay claim. The time required for delay analysis by the Engineer shall not be counted against the time allotted for processing final payment as required by (MAG 109.7(B)) or the release of retention and final payment as prescribed by Arizona Revised Statutes §34-221.

III. CALCULATING MONETARY DELAY DAMAGES:

Additional compensation for delay, when authorized by the Engineer, will be calculated in accordance with MAG 109.5 ACTUAL COST WORK with the following exceptions:

- A. No additional compensation or other monetary damages shall be awarded or paid for any loss of anticipated profits by the Contractor, subcontractors or suppliers.
- B. No additional compensation or other monetary damages shall be awarded for extended overhead or general conditions of the Contractor, subcontractors of suppliers.
- C. Equipment:
 - 1. Contractor-owned equipment rate calculations shall be computed in accordance with Section 109.04(A)(3), Arizona Department of Transportation "Standard Specifications for Road and Bridge Construction", 1990 or latest edition and as modified herein. Year and area adjustment factors shall be based on the most recent publication of the Rental Rate Blue Book for Construction Equipment, published by the Equipment Guide-Book Company, San Jose, Ca., same as provided by ADOT and in print as of the date of alleged delay. In no event shall the compensation for Contractor-owned equipment exceed the purchase price, including tax, paid by the Contractor for the equipment. Compensation shall not be allowed for small tools or equipment that show a daily equipment rental rate of less than \$5.00 per day.
 - 2. For leased and rented equipment or equipment not otherwise listed in the Blue Book, rental contracts or other supporting data will be used to establish the hourly rate. No hourly operating expense shall be allowed for delay or standby equipment. In no case will equipment be considered for rental which exceeds the hourly rate for the first eight hours and the daily rate divided by eight for all additional hours as compared with similar equipment listed in the Blue Book. The hourly standby rate shall be computed as the lesser of:
 - a. Dividing the monthly invoice or rental value by 176 hours per month when the equipment is utilized by the Contractor for more than three weeks;
 - b. Dividing the monthly invoice or rental value by 40 hours per week when the equipment is utilized by the Contractor for more than three days.In no event shall compensation be paid for delay at more than 8 hours per day or 40 hours per week.
 - 3. Except for vehicles used by supervisory personnel, all equipment shall be paid at the "standby" rate during the delay period.

4. Equipment brought in solely to mitigate the delay (such as pumps, light plants, etc.) may be paid in accordance with the ADOT section 109.04(A)(3)(c).
5. The Blue Book area percentage adjustment shall apply in determining rental rates.

D. Material:

Allowable material charges may include, in addition to material incorporated in the work, material used to mitigate the delay such as barricades, plates, shoring, cold mix, etc. Except in emergencies the Contractor shall not employ such material without the prior written approval of the Engineer.

E. Labor:

1. Except for supervisory personnel (superintendent, project engineer, and foremen), labor wages shall not be paid after the first one-half day of claimed delay or impact. It is expected the Contractor will reassign or layoff unneeded employees.
2. For foreman wages to be included, that foreman must have been actively employed on the project prior to the commencement of the delay and be directly responsible for the activity being delayed.
3. Labor burden shall be actual amounts incurred but shall not exceed the ADOT-approved rate.

F. All costs (equipment, material, and labor) shall be substantiated by Daily Force Account Work Sheets in the form attached as Attachment 1, reviewed and initialed by the inspector.

IV. DOCUMENTATION REQUIRED FOR CLAIM ANALYSIS:

For purposes of reviewing the Contractor's request for additional compensation, it will be required that the Contractor submit the following listed information. Information requested shall be prepared on forms which are substantially similar to the City of Mesa's Extra Cost-Actual Cost-Force Account Payment form, a copy of which is attached as an exhibit.

A. Labor:

For each employee, laborer, and foreman, for which compensation is requested: Name, classification, dates of work performed, daily hours worked, total hours worked, labor rates, labor burden rates, overtime or premium time charges. Further, the Contractor shall make available for inspection and copying to the Engineer the following listed documentation.

1. Certified payroll reports for the period of work claimed.
2. Accounting of Fringe Benefits -- certified by a CPA.
3. Contractor's and Subcontractor's daily field reports and daily diaries.

B. Materials:

For all materials for which compensation is requested, if any, total quantities of materials, prices, extensions and transportation costs shall be provided on a daily basis. Further, the Contractor shall make available for inspection and copying to the Engineer the following listed documentation.

1. Invoices for all materials incorporated:
2. Weigh tickets:
3. Purchase orders:
4. Delivery schedules:
5. Quotes or proposals from manufacturers or supplier;
6. Freight bills, Bills of Lading, or other documentation to show transportation costs:
7. Restocking charges-invoices from vendor.

C. Equipment:

For all equipment, the Contractor shall provide the Engineer with the designation, dates and hours of usage, dates and hours of standby, if any, daily hours, total hours, rental rates and extension for each unit of equipment and machinery. Rental rates shall be as established in Section III infra. Further, the Contractor shall make available for inspection and copying to the engineer the following listed documentation.

1. Owned:
 - a. Purchase contract(s):
 - b. Depreciation schedule(s):
 - c. Invoices for fuel, lube, repairs and other operating costs:
2. Leased:
 - a. Lease agreement with hourly rate, overtime rate, double shift rate, etc.
 - b. Invoices or other documentation showing hours worked on a daily basis.

D. Subcontractors/Owner-Operators:

In the event the Contractor submits a claim which includes requests for compensation for Subcontractors of Owner-Operators, the same information requested of the Contractor shall be provided by the Subcontractor/Owner-Operator. Further, the Contractor shall make available for inspection and copying to the Engineer the following listed documentation.

1. Bid/Estimate work sheets and/or spreadsheets:
2. Subcontract Agreements or Agreements with Owner-Operator:
3. All invoices and billing statements received from the Subcontractor/Owner-Operator which relate to the amount requested:

E. Miscellaneous:

Further, the Contractor shall make available for inspection and copying to the Engineer the following listed documentation.

1. Evidence of payment for bonds and insurance premiums (MAG 109.5.6).
2. Taxes - unless the contractor can show otherwise, taxes are reimbursable at the rate of 5.5% of 65% of the total cost (less bonds and insurance).

V. TIME LIMIT ON SUBMISSION OF CLAIM FOR DELAY OR IMPACT DAMAGES:

No claims for delay or impact damages shall be considered or allowed more than 45 days after the event or occurrence which the Contractor claims gives rise to the delay or impact. In no event will a claim for delay or impact damages be considered after submission by the Contractor of the final payment request.

1 Attachment - Daily Force Account Work Sheet

Approved as to form and content this 9 day of January, 1995.

s/ Harry Kent
Harry Kent, Public Works Manager
City of Mesa

DAILY FORCE ACCOUNT WORK SHEET

Copies of the Daily Force Account Work Sheet are available

At the office of

Engineering Construction
200 S. Center Street, Suite 2

or

6935 E. Decatur Street
Mesa, Arizona

or

Write to

City of Mesa
Engineering Construction SCSC
P. O. Box 1466
Mesa, Arizona 85211-1466

or call

480-644-2253